UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 12 | Number 4 Article 19

6-1-1934

Trial -- Power of Court to Dismiss an Action or Defense Upon Opening Statement of Counsel

Joel B. Adams

attention to the conflicting lines of authority in North Carolina on the subject, and to the need for definitive legislative action. While a complete revision of the system of sheriff's bonds probably would be best, it is submitted that the adoption of the following statute would clarify the existing confusion and afford the public that degree of security which seems desirable:

> No clause for the faithful execution of his office, found in the official bond of any public officer, shall be construed as limited to the specific duties therein enumerated, but every such clause shall render such officer and the sureties on his official bond liable to any person injured by any wrongful or unauthorized act done by said officer by virtue or under color of office.

J. A. KLEEMEIER, JR.

Trial—Power of Court to Dismiss an Action or Defense Upon Opening Statement of Counsel.

Plaintiff, as administrator, brought an action to recover for the death of his infant son, who was drowned after falling through an unguarded hole in the defendant's wharf. It was contended that the wharf, together with sandpiles thereon, brought the case within the doctrine of attractive nuisance. After the opening statement of the plaintiff's counsel, a verdict was directed for the defendant on the ground that it was not stated in such opening that the alleged nuisance was visible from the highway. *Held,* error. It was inferable from counsel's statement that the wharf and sandpiles could be readily seen from a near-by street.[1]

The privilege of making an opening statement is afforded counsel in order that he may outline his proofs to the jury and aid them in their understanding of the case to be presented.[2] It should be no more than an informal summary of the intended evidence, and cannot take the place of pleadings in determining the issues to be tried,[3]

[1] Best v. District of Columbia, 54 Sup. Ct. 487, 78 L. ed. 635 (1934).

[2] Paige v. Illinois Steel Co., 233 Ill. 313, 84 N. E. 239 (1908); State v. Sheets, 89 N. C. 583 (1883); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929), §561. Nor should the counsel be permitted to argue the merits under the guise of sketching his own case, Posell v. Herscovitz, 237 Mass. 513, 130 N. E. 69 (1921).

[3] Hunter Milling Co. v. Allen, 65 Kan. 158, 69 Pac. 159 (1902); Douglas v. Marsh, 141 Mich. 209, 104 N. W. 624 (1905); Mocre v. Dawson, 220 Mo. App. 791, 277 S. W. 58 (1925). The party should not be confined in the introduction of evidence to the statements made in the opening. Winfield v. Feder, 169 Ill. App. 480 (1912); Marcy v. Shelburne Falls & C. St. Ry. Co., 210 Mass. 197, 96 N. E. 130 (1911); Petherick v. Order of the Amaranth, 114 Mich. 420, 72 N. W. 262 (1897).

though admissions therein, when deliberately made, are binding upon the litigant.[4] The doctrine that such opening may be the basis for judgment is largely an outgrowth of a famous United States Supreme Court decision, *Oscanyan v. Winchester Repeating Arms Co.*,[5] decided in 1880. There the plaintiff sought to recover commissions for his services in bringing about a sale of firearms to the Turkish government. The opening of plaintiff's attorney showed clearly that the plaintiff had procured the sale through his influence as a diplomatic official of the purchasing government. Thereupon the case was dismissed as being founded upon a corrupt and unconscionable cause of action, which the court refused to entertain. The principles of this case have been expanded until, at the present time, the practice of deciding cases upon the basis of the opening statement has become a relatively common one, and a dismissal may be had upon much slimmer grounds than those presented in the *Oscanyan case.*

The attitude of the courts on a specific case is not easily predictable, as each case must, to a great extent, stand upon its own bottom, and so much depends upon the discretion of the trial court, but the authorities seem to group themselves into three rather indistinctly defined groups:

(1) Some of the courts have refused to sanction the practice, either because it is considered an abortive method of deciding cases, which deprives the litigant of his day in court,[6] or because of statutory inhibitions.[7]

(2) A second group are willing to go the whole way, and will dismiss the case when the opening statement fails to show facts which, if proved, would make out a cause of action or defense.[8]

[4] WIGMORE, EVIDENCE (2d ed., 1923), Vol. 5, §2594; *cf.* Wasmer v. Missouri Pac. Ry. Co., 166 Mo. App. 215, 148 S. W. 155 (1912).

[5] 103 U. S. 261, 26 L. ed. 539 (1880).

[6] Pietsh v. Pietsh, 245 Ill. 454, 92 N. E. 325 (1910); Fischer v. Fischer, 5 Wis. 472 (1856); Fletcher v. London & North Western R. Co., [1892] 1 Q. B. 122, 65 L. T. Rep. 605. The reasons for such holding are more persuasive in England than in this country, due to the division of labor between advocate and solicitor. Bailey, *The Admission of Barristers and Solicitors in England,* (1928) 14 MASS. L. Q. 60, at 60. It has been intimated by at least one court which adheres to this rule that, should a similar situation be presented, the Oscanyan case would be followed. Martin Emerich Outfitting Co. v. Sigel, Cooper & Co., 108 Ill. App. 364 (1903); Sun Oil Co. v. Garren, 261 Ill. App. 513 (1931).

[7] Wheler v. Oregon R. & Navigation Co., 16 Idaho 375, 102 Pac. 347 (1909).

[8] Bias v. Reed, 169 Cal. 33, 145 Pac. 516 (1914); Energy Electrical Co. v. General Electric Co., 262 Mass. 534, 160 N. E. 278 (1928); Spicer v. Bonker,

However, it may be noted, in this connection, that counsel is given ample opportunity to amend and elaborate upon his opening,[9] and he is to have the advantage of every reasonable inference which may be drawn from the facts stated.[10] Moreover, the court should point out to him wherein his statement is defective in order that such defect may, if possible, be remedied.[11]

(3) The remaining decisions adopt a middle ground, and will dismiss the action after the opening statement only when something is affirmatively asserted therein which will absolutely preclude the cause of action or defense.[12]

45 Mich. 630, 8 N. W. 518 (1881); Berkman v. Cohn, 111 N. J. L. 229, 168 Atl. 290 (1933); Cornell v. Morrison, 87 Ohio St. 215, 100 N. E. 817 (1912) ("It is, in substance and effect, for the purposes of the motion, an agreed statements of facts."); Smith v. Groesbeck, 54 S. D. 350, 223 N. W. 308 (1929) commented upon (1929) 15 IA. L. REV. 227; *cf.* Neckel v. Fox, 110 Ohio St. 150, 143 N. E. 389 (1924); Coughlin v. State Bank of Portland, 117 Ore. 83, 243 Pac. 78 (1926) (In view of the complexity of the facts it was error to dismiss the complaint on the opening statement.).

[9] Barto v. Detroit Iron & Steel Co., 155 Mich. 94, 118 N. W. 738 (1908); Donnelly v. Paramount Organization, 109 N. J. L. 57, 160 Atl. 569 (1932); note (1933) 83 A. L. R. 221.

[10] Kelick v. Cleveland, 24 Ohio App. 82, 156 N. E. 248 (1927); HYATT, TRIALS (1924), Vol. 2, §1459.

[11] Haynes v. Maubury, 166 Mich. 498, 131 N. W. 110 (1911).

[12] Butler v. National Home for Soldiers, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. ed. 346 (1891); United States v. Deitrich, 126 Fed. 676 (C. C. D. Neb., 1904) (Defendant was indicted for receiving bribes while a member of the Senate. The opening statement for the prosecution showed that he was not, in fact, a member of that body at the time of the alleged offense. The court said: [at 677] "Where by the opening statement for the prosecution in a criminal trial, and after full opportunity for correction of any ambiguity, error or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction, the court may upon its own motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to the evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."); Smith v. Standard Sanitary Mfg. Co., 254 Fed. 427 (C. C. A. 2d, 1918) (promoter seeking to recover commissions showed that he was not employed, and that the alleged deal was never consummated); Millsaps, Hatchett & Co. v. Nixon, 102 Ark. 435, 144 S. W. 915 (1912) (contract of surety shown to be within the statute of frauds); Brasher v. Rabenstein, 71 Kan. 455, 80 Pac. 950 (1905); State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918) (action should not be dismissed merely because opening failed to state that crime was committed within the jurisdiction of the court); Miner v. Town of Hopkinton, 73 N. H. 232, 60 Atl. 433 (1905) (statement contained facts which would take case out of perview of statute under which it was instituted); Hoffman House v. Foote, 172 N. Y. 384, 65 N. E. 169 (1902); Denefeld v. Baumann, 40 App. Div. 502, 58 N. Y. Supp. 110 (1899) (The statement contained facts which showed affirmatively that it was solely the negligence of the tenant which caused the injury; held, that the action was properly dismissed as to the landlord.); Preusse v. Childwold Park Hotel, 134 App. Div. 383, 119 N. Y. Supp. 98

This practice of deciding cases on the basis of the opening statement is subject to criticism, in that it seems to place greater emphasis upon an informal, and often perfunctory, speech of counsel than upon the carefully-drawn answer or complaint. It is submitted, however, that the benefits to be derived from a careful use of this power greatly outweigh the possible evils which may result from its abuse. It is to be employed only in extreme cases, and then only after the party has been given the benefit of every doubt. Moreover, there is a further safeguard, which, psychologically at any rate, will prove a deterrence to any rash action on the part of the trial judge. If the action is dismissed, it is more than likely to meet with reversal at the hands of the appellate tribunal; whereas, if the motion is denied, and the party is able to go forward and prove his case, the defect, if any, is cured;[13] if he is unable to accomplish this, his opponent is already victorious without an appeal.

JOEL B. ADAMS.

Trusts—Constructive Trust to Protect Victims of Theft.

B, an officer of a building and loan association, embezzled some $8,000,000 from the association over a period of nine years. The embezzled funds were invested in, and deposited to the account of, a dummy oil corporation organized and controlled by *B*. In an action by the receiver of the building and loan association to declare a constructive trust upon all the assets of the oil corporation, *held*, a trust would be impressed upon the embezzled funds traced to a bank account of the oil company, and as far as they could be traced into other assets of the oil company.[1] Other parties, who were creditors of the oil company by reason of money advanced, and credit extended in sales transactions, were protected *pro tanto*.

There has been much reluctance in the application of the constructive trust device for the protection of victims of theft. It has been variously objected that there are adequate remedies at law,[2] that assumption of equity jurisdiction deprives the defendant of right

(1909) (claim shown to be barred by the statute of limitations); Abraham v. Gelwick, 123 Okla. 248, 253 Pac. 84 (1926); Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 Pac. 308 (1905).

[13] Glass v. American Stores Co., 110 N. J. L. 152, 164 Atl. 305 (1933); *cf.* Meaney v. Doyle, 176 Mass. 218, 177 N. E. 6 (1931) ("Although a trial judge has power to direct a verdict at the close of the opening, he is not, as a matter of law, obliged to do so . . . whether so to rule rests in his discretion.").

[1] Elmer Co. L't'd. v. Kemp, 67 F. (2d) 948 (C. C. A. 9th, 1933).

[2] Robinson v. Mutual Life Insurance Co., 193 Fed. 399 (C. C. A. 2d, 1912) (Insurance company director embezzled funds and turned them over to culpable president. Accounting denied.).